86-1058

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MILDRED BAILEY BELL, PETITIONER

v.

JOHN THOMAS BELL, JR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mildred B. Bell
Petitioner, pro se

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9 pp

QUESTIONS PRESENTED

In a suit to domesticate and enforce a Georgia judgment in Mississippi, the federal district court domesticated the judgment and determined Respondent's arrearages under an agreement that had been incorporated into the Georgia court's final Judgment and Decree. The questions presented are:

1.

(a) In reviewing the district court's determination of arrearages, did the court below deny Petitioner's Georgia judgment full faith and credit by refusing to apply a presumption of Georgia law that unless the court finds the written language itself to be ambiguous, the parties are conclusively presumed to have intended precisely what the written language provides?

(b) Did the federal court in effect modify Petitioner's Georgia judgment by determining that the parties' intent was con-

trary to the plain meaning of the written language and, further, by determining that the parties intended to limit their contractual obligations in ways not specified in the Georgia judgment?

2.

After determining that Respondent had in fact disobeyed the Georgia judgment, did the federal court have discretion to refuse to consider Petitioner's assertion that under a Georgia statute she is entitled to compensatory damages as a result of Respondent's wrongful refusal to pay amounts required by the Georgia judgment prior to its domestication?

PARTIES BELOW

All parties to this case in the court below are listed in the caption of this petition.

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JOHN THOMAS BELL, JR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Mildred B. Bell respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion entered by the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals was not reported. It appears in the Appendix to this petition, beginning at page A.1,

infra. The court of appeals' Order denying a timely petition for rehearing en banc appears at page A.52, infra.

The district court's Memorandum Opinion, also unreported, is set forth in the Appendix, beginning at page A.29.

JURISDICTION

The judgment of the court below was entered on September 18, 1986 [A.50]. A timely petition for rehearing en banc was filed on October 1, 1986. That petition was denied on October 16, 1986. [A.52].

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Full Faith and Credit statute, section 1738 of the Judicial Code (28 U.S.C.A. § 1738) provides, in pertinent part:

> The records and judicial proceedings of any . . . State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed,

> if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Section 13-6-11 of the Official Code of Georgia (1981) (formerly § 20-1404 of the 1933 Code) provides as follows:

> The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

STATEMENT OF THE CASE

This case originated in the United States District Court for the Northern District of Mississippi as an action to domesticate and enforce a 1974 Georgia judgment.

The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 because of diversity of citizenship, the plaintiff being a citizen of Georgia and the defendant a citizen of Mississippi.

The Complaint, filed in April 1985, alleged that Respondent had refused to make payments required by the Georgia judgment. [R. 2]. Respondent denied that he was in arrears but asserted no affirmative defense to the allegation of arrearages. [R. 12].

A bench trial was had, and on February 24, 1986, Judgment was entered domesticating the Georgia judgment and determining that Respondent had failed to make certain payments required by that judgment. [A.54].

Petitioner appealed the district court's judgment insofar as it determined that the Georgia judgment did not require Respondent to make some of the installment payments Petitioner sought to recover, and

insofar as the district court refused to consider her assertion that she was entitled to compensatory damages under Georgia law as a result of Respondent's wrongful refusal to obey the Georgia judgment prior to its domestication in Mississippi.

A. Determination of Respondent's Arrearages.

At issue in the district court was the legal effect of that portion of the Georgia judgment which incorporated a separation agreement previously entered into by the parties. The judgment ordered both parties to abide by all provisions of the incorporated agreement. Only two provisions of that agreement are involved in this appeal--Item Three and Item Four.

Item Three of the incorporated agreement contains a salary equalization provision requiring Respondent to make monthly payments to Petitioner so long as Petitioner's earned income is less than Respondent's. The amount of the payments is de-

termined according to a formula contained in Item Three, using the parties' "gross pretax income" as the starting point. [R. 8-9]. Item Three also provides:

> This provision shall be temporarily inoperable during any period of time when [Petitioner's] gross income shall equal or exceed [Respondent's] and shall become null and void in the event [Petitioner] marries again. As used in this item the term "gross income" shall be construed to include all compensation paid by the parties' primary employers. [Emphasis added]. [R. 8-9].

Item Four of the incorporated agreement requires both Petitioner and Respondent to make payments of $500 per month to a fund to be used for their children's "educational, clothing, allowance, and other personal expenses." [R. 9]. The last paragraph of Item Four reads as follows:

> All of the provisions contained in this item shall be fully operative until each of the children has completed any college or graduate training which he or she wishes to undertake, at the end of which time

> any monies remaining in the account shall be divided evenly between the parties to this agreement. [Emphasis added]. [R. 9].

Item Four of the agreement is the only provision dealing with child support (apart from Item Six, which requires Respondent to continue providing the medical insurance coverage he had been providing prior to the divorce), and it requires of Petitioner (the custodial parent) exactly the same amount it requires of Respondent.

The district court did not find an ambiguity in the written language of either Item Three or Item Four, but in determining Respondent's arrearages under these provisions the court nevertheless undertook construction of the document. [Appendix, infra, especially at A.31 and A.41-45].

As construed by the district court, the Item Three definition of gross income (i.e, "all compensation paid by the parties' primary employers") does not require the par-

ties to treat their entire gross salary as "compensation." The district court then concluded that a portion of Respondent's 1983 salary--from which income and social security taxes were withheld [Transcript, p. 37 (Tr. 37)]--was not part of Respondent's "compensation" for Item Three purposes. On appeal, the Fifth Circuit held that the district court's determination on this point was a finding of basic fact and that it was not clearly erroneous. [A.20-21].

As construed by the district court, the Item Four language ("All of the provisions contained in this item shall be fully operative until each of the children has completed any college or graduate training which he or she wishes to undertake . . .") requires the parties to make payments to their children's education and support fund only during months when one or more children are pursuing "qualifying" graduate

training. On the basis of that construction the district court concluded that Respondent's obligation to make payments to the fund was temporarily inoperative from the time the oldest child completed his first year of graduate medical education in 1982 until the youngest child entered law school in 1984.[1] In the district

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[1] It is undisputed that the youngest child began the law school application process in the spring of 1981, before she received her bachelor's degree. [Tr. p.15]. It was stipulated in the pretrial order that in May 1981, when Respondent was already more than $2500 behind in education-fund payments [Stipulation 16], he notified Petitioner that he would make no further payments to the children's fund [Stip. 14], and that he in fact discontinued payments at that time [Stip. 8]. [1st Supplemental Record, p. 110].

The parties also stipulated, inter alia, to the following:

(1) The oldest child received his B.S. degree in 1975, entered medical school in 1977, graduated from medical school in June 1981, completed one year of clinical training as an intern in 1982, and completed a three-year specialty training program as a resident in ophthalmology in June 1985. [Stips. 9, 10, and 11].

(2) In April 1982 Respondent told Petitioner that he would pay what he owed up to that time (more than $7000, Stip. 16) but that he would like for the Item Four obligation to stop as of that

court's opinion, graduate medical training undertaken as an intern is part of a physician's "formal education" and is therefore within the purview of Item Four's "graduate training" provision, but graduate medical training undertaken as a resident is not part of a physician's "formal education" and therefore is not within Item Four's "graduate training" provision. [A.44].

The record establishes that in the summer of 1982--when the district court said Respondent's Item Four obligation became temporarily inoperative because the oldest child's graduate training was not "qualifying" graduate training and the youngest child was not at that time pursuing graduate training on a full-time basis--Respond-

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time and that he would like to negotiate with the youngest child alone his assistance in her future education. [Stip. 15].

(3) In April 1983 Respondent told Petitioner, "I am saying that educational expenses are over. I will work with [the youngest child] and will be glad to do so." [Stip. 17].

ent already had refused to obey the Georgia judgment and was more than $7000 in arrears in education-fund payments.[2]

On appeal, Petitioner asserted (1) that by failing to give effect to the plain meaning of the written language the district court modified her Georgia judgment, rendering it only partially enforceable in the State of Mississippi, and (2) that even if construction of the document had been permissible, the manner in which the district court construed the agreement was contrary to Georgia law and denied the Georgia judgment full faith and credit.

The Fifth Circuit affirmed the district court's determination that Item Four of the Georgia judgment was temporarily inopera-

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[2]Respondent owed more than $2500 in May 1981 when he discontinued payments. According to the district court's judgment, he should have paid in an additional $6000 during the year thereafter—a total of $8500 (without regard to statutory interest of 12% per annum on each past-due installment). In fact, he paid in only $1000 between May 1981 and Ma7 1982. See note 1, supra.

tive from the time the oldest child completed his medical internship in 1982 until the youngest child entered law school in August 1984.

The court of appeals, like the district court, did not find any ambiguity in the written language itself. In the appellate court's view, affirmance of the district court's determination of arrearages did not require "construction" of the document but was, rather, based upon "interpretation" which was undertaken in order to ascertain "the intentions of the parties as expressed in the contractual language." [A.15, & n.3 at A.15-16].

The court of appeals did not address Petitioner's contention that the federal court was required to apply Georgia law's presumption that when the written language itself is unambiguous the parties are conclusively presumed to have intended precisely what the written language provides.

[See Petitioner's "Brief for Appellant," pp. 27-28].

The court of appeals did, however, consider (and reject) Petitioner's contention that the federal court must apply a rule of Georgia law that unambiguous written language used by the parties must be afforded its literal meaning. Instead, the appellate court applied what it termed "customary rules of interpretation." [A.15].

B. The Compensatory Damages Issue.

In the district court, Petitioner asserted that under a Georgia statute (O.C.G.A. § 13-6-11) she was entitled to compensatory damages as a result of Respondent's wrongful refusal to pay amounts owed under the Georgia judgment prior to its domestication in Mississippi.

The district court treated Petitioner's claim for damages under the Georgia statute as a request for attorney's fees under

Mississippi law and denied the request.

The court of appeals affirmed, stating that Petitioner's assertion that she is entitled to compensatory damages as a result of Respondent's wrongful pre-domestication conduct brings into play the rule that the law of the forum state determines the methods available for enforcing the domesticated judgment. On that basis, the Fifth Circuit held that the district court properly refused to consider the Georgia compensatory-damages statute. [A.26-28].

The case is now before this Court on petition for Writ of Certiorari so that this Court may review (1) the lower court's determination that full faith and credit does not require the district court to enforce the Georgia judgment in accordance with the literal meaning of the language contained therein, and (2) its determination that the district court properly refused to consider Petitioner's claim that

she is entitled to compensatory damages under Georgia law.

REASONS FOR GRANTING THE WRIT

I.

THE COURT BELOW DID NOT DETERMINE RESPONDENT'S ARREARAGES UNDER THE GEORGIA JUDGMENT BY APPLYING GEORGIA LAW AND, AS A RESULT, RENDERED THE GEORGIA JUDGMENT ONLY PARTIALLY ENFORCEABLE IN MISSISSIPPI.

Both the district court and the court of appeals recognized that the full faith and credit statute requires federal courts to give to Petitioner's Georgia judgment the same effect the judgment would have in Georgia courts. Both courts, however, overlocked the well-settled principle that in determining the effect a Georgia court would give to the judgment, the federal courts must apply the same Georgia law that Georgia courts would be required to apply. See e.g., Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985).

Under Georgia law the written language of any contract, whether incorporated into

a judgment or not, is controlling. The language actually used by the parties must be given effect and, unless the language used by the parties is ambiguous, the court is not permitted to "inquire" into the parties' intent. If there is no ambiguity, the language is conclusively presumed to express the parties' intent. National Manufacture & Stores Corp. v. Dekle, 173 S.E. 408, 411 (Ga. App. 1934), and cases cited therein. It is error for the court to undertake to construe such a document. Wolverine Insurance Co. v. Jack Jordan, Inc., 99 S.E.2d 95, 97-98 (Ga. 1957); Miltiades v. Miltiades, 289 S.E.2d 12, 13 (Ga. App. 1982). See also Queen Insurance Co. v. Nalley Discount Co., 114 S.E.2d 21 (Ga. 1960); McCullough v. Kirby, 51 S.E.2d 812 (Ga. 1949).

In Wolverine, the Georgia Supreme Court explained its refusal to construe an unambiguous insurance contract as follows:

> [I]t is . . . well settled that no construction is required or even permissible when the language employed by the parties in their contract is plain, unambiguous, and capable of only one reasonable interpretation. In such an instance, the language used must be afforded its literal meaning and plain ordinary words given their usual significance, and this rule applies equally as well to insurance contracts as to any other contract.

99 S.E.2d at 97-98. Although the Fifth Circuit quoted a portion of the Wolverine language set out above, the court rejected Petitioner's contention that the principle applied by the Georgia Supreme Court in Wolverine must also be applied in this case. [A.15, n.3, infra].

Neither of the courts below found any ambiguity in the written language. Nevertheless, both courts undertook to "ascertain" the parties' intent. As the Fifth Circuit put it:

> The phrase "college or graduate training" is, as plaintiff contends, a plain and ordinary term in the abstract. When applying it to the present circumstances, however, doubt

> arises. . . . To resolve the doubt, we return to the intent of the parties as expressed in the agreement.

[A.13-14]. The court did not, however, accept the plain language of the incorporated agreement as expressing the parties' intent. Instead, it approved the district court's substitution of the term "formal education" for the term used by the parties ("graduate training") and affirmed the district court's ruling that the oldest child's medical residency was not part of his "formal education" and therefore was not "qualifying" graduate training under Item Four. [A.13-18].

Under Georgia law the plain, ordinary meaning of a word or term is the meaning that must be applied. If doubt exists as to the meaning of a word or term, the dictionary must be consulted to determine its plain, ordinary meaning. Henderson v. Henderson, 264 S.E.2d 299, 301 (Ga. App. 1979). If, but only if, a word or term has two or

more reasonable meanings, then of course the court must determine which meaning the parties intended the word or term to have in their agreement. But words that have a plain meaning in the abstract do not become of uncertain meaning merely because circumstances might be hypothesized in which they would be difficult to apply. (See, e.g., A.10). When the meaning of the language used by the parties is clear, "all that remains to be done, and all that should be done, is to apply [that plain meaning] to the subject-matter." Dorsey v. Clements, 44 S.E.2d 783, 789 (Ga. 1947).

For example, to determine whether a medical residency is "graduate training," a court applying Georgia law must apply the plain ordinary (dictionary) meaning of the term "graduate training": "of or relating to, or engaged in studies that go beyond the first or bachelor's degree and are usually specialized or professional." Web-

sters Third New International Dictionary (G. & C. Merriam Co., 1961), p. 985. Clearly the court's conclusion that the graduate training undertaken by medical residents is not "qualifying training," within the meaning of Item Four, was not reached by applying the plain meaning of the term "graduate training" to the facts.

Furthermore, neither of the courts below gave any effect whatever to the specific requirement that payments into the children's education fund are to continue unabated until all of the children have completed their graduate training. There is no basis for assuming that the parties did not intend precisely that. Indeed, it is clear that if they had wished to make Item Four temporarily inoperative from time to time they knew how to do so: Item Three specifically provides that Item Three is to be temporarily inoperative in certain circumstances. See supra, p. 6.

In short, the court took the specific language used by the parties in Item Four:

> All of the provisions contained in this item shall be fully operative until each of the children has completed any college or graduate training which he or she wishes to undertake . . . .

and applied it as if it read as follows:

> The provisions contained in this item shall be temporarily inoperative during any month when none of the children are actually pursuing college or "qualifying" graduate training on a full-time basis.

If the parties had wished to agree to such a provision, they could have done so. But they did not. The court in effect rewrote the parties' agreement--creating an ambiguity where none existed--and then undertook to construe the revised language by taking into account such extraneous factors as the court deemed relevant to the question of what comes within the term "qualifying graduate training." That question does not arise under the plain language of the Georgia judgment; the language

used by the parties imposes no restrictions upon the kinds of graduate training covered by Item Four. The court's re-writing of the incorporated agreement is contrary to Georgia law, and it is contrary to the district court's conclusion that Respondent himself did not intend "to limit his children in their educational pursuits" [A.43].

With respect to Item Three of the parties' agreement, the district court determined that Respondent was not required to include a portion of his 1983 salary in "gross income" (defined in the agreement as "all compensation paid by the parties' primary employers"). In the Fifth Circuit's view, the district court found as a basic fact that a portion of Respondent's gross salary was "reimbursement" rather than "compensation." Petitioner submits, however, that this was a conclusion by the district court, not a finding of basic fact.

The basic facts were that Respondent

received a "salary adjustment" (i.e., a bonus) in the last month of the 1982-1983 academic year. [Tr. 20-21]. It was paid to him as salary, and his employer treated it as such by withholding income and social security taxes from it. [Tr. 37]. Respondent claimed that the reason he was given the bonus was "essentially" to reimburse him for amounts he had expended "over the years" in performing his duties as a faculty member at Mississippi State University. [Tr. 27-28]. From this, the court concluded that the bonus was not "compensation" within the meaning of that word as used in the Georgia judgment. Clearly the court did not reach that conclusion by applying the plain, ordinary meaning of either the term "gross income" or the word "compensation" to the basic facts. Nevertheless, the court of appeals affirmed.

In determining Respondent's arrearages

under Items Three and Four of the domesticated judgment, the court below did not apply the plain, ordinary language of the written agreement to the existing facts. Instead, it construed an unambiguous document. The cardinal rule of construction, under Georgia law, is to ascertain the parties' intent, but this is a rule of construction and cannot come into play unless the language used by the parties is of doubtful meaning. Otherwise, the conclusive presumption that the parties intended precisely what they said must be applied.

Furthermore, when a document is ambiguous and construction therefore is required, there are other rules of construction that also must be applied, such as that the agreement must be construed in such manner as to give effect to every part and must not be construed in such a way as to permit an obligor, by his own wrongful conduct, to nullify the obliga-

tions undertaken by him in the agreement. The appellate court's construction of the incorporated agreement does not conform to either of those rules of construction.

For example, as construed by the court, either party can--at any time--render Item Four inoperative simply by refusing to make the required payments to the education fund (making it impossible for the children to remain in school) and then claiming that the obligation to pay into the fund has ceased <u>because</u> the children are not in school. The record shows unequivocally that this is precisely what Respondent did.

The appellate court said that "defendant was reasonably entitled to conclude that his Item Four obligation came to an end in May 1982" because the youngest child was not at that time enrolled in "qualifying training." [A.12]. Yet the record shows that Respondent was more than $7000 in arrears in May 1982. It is noteworthy

that, as construed by the court, Respondent's obligation ended (temporarily) after he refused to pay into the fund and would never have been reinstated if Petitioner had not finally been able to let the youngest child resume full-time graduate education despite Respondent's arrearages and despite his continued refusal to make the required Item Four payments.

The lower court's refusal to enforce payment of the installments due under the Georgia judgment between June 1982 and August 1984 (and statutory interest thereon) is contrary to Georgia law and is contrary to the requirements imposed upon federal courts by the full faith and credit statute.

II.

THE GEORGIA STATUTE PROVIDING FOR COMPENSATORY DAMAGES WHEN THERE HAS BEEN A WRONGFUL REFUSAL TO PAY AMOUNTS OWED IS ITSELF A PART OF THE PARTIES' AGREEMENT AND IS NECESSARILY A PART OF THE GEORGIA JUDGMENT.

In the district court Petitioner sought to recover all expenses of litigation as

compensatory damages under Georgia Code § 13-6-11 [p.3, supra]. Under that statute, when a debtor has acted in bad faith, has been stubbornly litigious, or has caused his creditor unnecessary trouble and expense in collecting the debt, all expenses of litigation (including attorney's fees) may be awarded as compensatory damages.

The statute applies to suits in equity as well as to suits at law, Eiberger v. West, 281 S.E.2d 148, 151 (Ga. 1981), and recovery of such damages is authorized if any one of the three grounds is present. Ford Motor Co. v. Stubblefield, 319 S.E.2d 470, 481 (Ga. App. 1984). The damages allowed under this statutory provision are compensatory, not punitive. Bowman v. Poole, 91 S.E.2d 770, 772 (Ga. 1956); Bankers Fidelity Life Insurance Co. v. Oliver, 126 S.E.2d 887, 890 (Ga. App. 1962).

The State of Georgia has a legitimate interest in protecting Georgia creditors

from debtors who refuse to pay their debts and who use what the Georgia courts have termed the "'so-sue-me' ploy," gambling on the other person's unwillingness to go to the trouble and expense of a lawsuit.

The Georgia Court of Appeals has noted that a creditor who must go to court to collect a perfectly valid, technically undisputed claim because the other party simply decides not to pay has but a Pyrrhic victory if saddled with the litigation expenses incurred as a result of the debtor's refusal to pay. Buffalo Cab Co. v. Williams, 191 S.E.2d 317 (Ga. App. 1972). "Nor can we ignore the effect on all other claims of this nature. . . . [If such a result obtains] it will be very difficult to convince the public that this is the operation of a reasonable system of justice. Proper application of [§ 13-6-11] should reduce the possibility of that result." 191 S.E.2d at 319. See also White, Weld & Co. v.

Cowan, 585 F.2d 136 (5th Cir. 1978); Fuller v. Moister, 282 S.E.2d 889, 890 (Ga. 1981); Khoury v. Skidaway Island Engineering Co., 323 S.E.2d 692, 693 (Ga. App. 1984).

Respondent conceded below that Petitioner "might well" have been able to recover compensatory damages under the Georgia statute if she had filed her suit in a Georgia court but argued that by "choosing" to file in Mississippi she somehow forfeited her right to compensatory damages under Georgia law. [Respondent's "Brief of the Appellee," p.21].

Respondent's argument overlooked several points. It overlooked the fact that there is no way to enforce a Georgia judgment in Mississippi by domesticating the Georgia judgment in a Georgia court. It overlooked the fact that Petitioner already had a Georgia judgment which Respondent refused to obey and which she could not enforce because he and his property are

located in Mississippi. And it overlooked the fact that when Petitioner went to Mississippi to enforce her Georgia judgment, she did not leave Georgia law behind; it went to Mississippi with her. Full faith and credit requires no less.

The agreement between these parties, which the Georgia court incorporated into its judgment, is a Georgia contract and Georgia law entered into and became a part of that contract. Dorsey v. Clements, 44 S.E.2d 783, 787 (Ga. 1947). The Georgia statute providing for compensatory damages when a debtor wrongfully refuses to pay amounts owed is just as much a part of the contract, and therefore of the Georgia judgment, as if the written language of the contract itself provided for compensatory damages in the event of a bad faith default under the incorporated agreement. See Aetna Life Insurance Co. v. Dunken, 266 U.S. 389, 399 (1924). Respondent can-

not avoid liability for compensatory damages under Georgia law simply by moving to Mississippi and forcing Petitioner to seek him out and sue him there in order to enforce the Georgia judgment.

By refusing to consider Petitioner's claim that she is entitled to compensatory damages as a result of Respondent's wrongful refusal to pay amounts owed under the Georgia judgment, the court of appeals failed to give full force and effect to Georgia statutory law, to Georgia decisional law, and to the Georgia judgment.

CONCLUSION

The decision below renders Petitioner's Georgia judgment only partially enforceable in Mississippi. Petitioner therefore prays that the Writ of Certiorari issue to review the Fifth Circuit's rulings on the issues set forth above and respectfully suggests that summary reversal would be appropriate.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4196

(District Court Docket No. EC85-193-GD-D)

MILDRED BAILEY BELL,

Plaintiff-Appellant,

versus

JOHN THOMAS BELL, Jr.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi

[Submitted on Briefs]

Before REAVLEY, JOHNSON, and DAVIS, Circuit Judges.

OPINION OF THE COURT

[Filed September 18, 1986]

JOHNSON, Circuit Judge:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Plaintiff Mildred Bailey Bell appeals from the district court's judgment awarding some, but denying other relief requested by her. We affirm the judgment of the district court.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff Mildred Bailey Bell and defendant John Thomas bell, Jr., once spouses, were divorced by a judgment and decree entered on November 6, 1974, by the Superior Court of Clarke County, Georgia. The parties had entered into a written separation agreement providing for, among other things, alimony for the plaintiff and payments into a fund for the education of the parties' three children. The Georgia judgment and decree incorporated this separation agreement.

On April 24, 1985, plaintiff, a Georgia resident, brought the present diversity action against defendant in federal district court in Mississippi, where defen-

dant now resides. She alleged, among other things, defendant's failure to make certain alimony and education fund payments. She requested, together with other relief, that the Georgia judgment and decree be domesticated and enforced against defendant. In its judgment entered on February 2 [sic], 1986, the district court domesticated the Georgia judgment and decree and further awarded some, but denied other requested relief. **Bell v. Bell**, No. EC 85-193-D-D. Plaintiff appeals from the district court's judgment.

II. DISCUSSION

At the outset, we take note of some principles of law applicable to our review of several issues raised in plaintiff Bell's appeal. Title 28 U.S.C. § 1738 provides:

> The records and judicial proceedings of any court of any . . . State, . . . [once properly] authenticated, shall have the same full faith and

> credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . from which they are taken.

Thus, section 1738 required the district court to give to plaintiff's Georgia judgment and decree the same effect they would have in a Georgia court. **Hazen Research, Inc. v. Omega Minerals, Inc.**, 497 F.2d 151, 153 & n.1 (5th Cir. 1974). Under Georgia law, the obligations in a separation agreement incorporated by a judgment become obligations imposed by the judgment itself. **McClain v. McClain**, 235 Ga. 659, 221 S.E.2d 561, 564 (1975). The provisions of incorporated agreements are nevertheless interpreted and construed according to the rules applicable to contracts generally. **Rodgers v. Rodgers**, 234 Ga. 463, 216 S.E.2d 322, 323 (1975). Finally, in reviewing the district court's interpretation of the incorporated separation agree-

ment, we are guided by the discussion in **Backar v. Western States Producing Co.**, 547 F.2d 876 (5th Cir. 1977), of the appropriate standard of review. Since "the interpretation of a contract is usually a question of law," when the "basic facts underlying" the district court's interpretation of a contract "are not disputed," but rather "only their legal effect," we "review untrammelled by [Federal Rule of Civil Procedure] 52(a)'s clearly erroneous standard." **Backar**, 547 F.2d at 880. Of course, the **Backar** standard of review does not prevent our adopting, as we shall have occasion to do, the district court's legal reasoning when sound.

In her appeal plaintiff Bell makes four assignments of error.

1.

First, in numerous permutations of legal argument, she contends that the district court committed error in its treat-

ment of defendant Bell's obligation under Item Four of the parties' agreement. Paragraph one of Item Four imposes this obligation:

> Each of the parties to this agreement shall deposit, to a bank account which shall be opened by Mildred for this purpose, the sum of Five Hundred Dollars per month to be used for the children's educational, clothing, allowance, and other personal expenses.

Item Four's third paragraph governs the duration and termination of the obligation:

> All of the provisions contained in this item shall be fully operative until each of the children has completed any college or graduate training which he or she wishes to undertake, at the end of which time any monies remaining in the account shall be divided evenly between the parties to this agreement.

Below the parties disputed the nature of defendant's Item Four obligation after his $500.00 payment in May 1981. According to the district court's opinion, each of the parties' three children obtained an educa-

tional degree in this month.[1] After graduation from medical school in May 1981, the parties' oldest child embarked upon a one-year internship program, followed by a three-year residency program in Georgia.

At some point following her graduation with a bachelor's degree in May 1981, the parties' youngest child enrolled in night courses at the graduate level. She was enrolled in night courses beginning at

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[1]Plaintiff suggests on appeal that the district court through apparent oversight incorrectly designated May 1981 as the month in which the children received their degrees. June 1981, she states, is the correct month. She further suggests that this same oversight caused the district court to conclude that May 1982 was the final month of the oldest child's twelve-month internship. June 1982, she states, was the final month. Plaintiff has not directly challenged this finding of fact, presumably because she was confident of an appellate ruling in her favor on the Item Four issue. Such a ruling would render the finding immaterial.

Since we affirm the district court's Item Four ruling, the finding remains material. In the absence of a challenge, we do not address whether the record supports this finding of the district court. We do note, however, that plaintiff might apply to the district court for relief pursuant to Federal Rule of Civil Procedure 60.

least with the fall 1981 quarter through the winter 1982 quarter. She enrolled again for the fall 1982 quarter, but dropped out before quarter's end. Starting in November 1981, she was also working a full-time schedule. In August 1984, she entered law school and was a second-year law student when the district court issued its opinion in February 1986.

Plaintiff contended below that Item Four has required defendant to make a monthly $500.00 payment continuously since May 1981. The district court concluded, however, that defendant's Item Four obligation terminated in 1981 when the children received their degrees, but was soon reinstated when the oldest child began his internship. It also concluded that the obligation again terminated in May 1982 at the end of the one-year internship and was not reinstated by this child's residency thereafter. Further, the youngest child's

enrollment in night courses did not, according to the district court, reinstate the obligation, but her enrollment in 1984 in law school as a full-time student did.

Plaintiff argues initially and principally that Item Four requires continuous monthly payment so long as one of the three children has yet to complete college or graduate training. Since the youngest child has not finished law school, defendant was required, plaintiff concludes, to make payments, not only until the internship's end in May 1982, but continuously ever since. She resists the district court's conclusion that the three-year residency and the night courses did not qualify as college or graduate training within the meaning of Item Four. Even if one were to conclude, however, that none of the children was pursuing qualifying training from May 1982 until August 1984, the defendant's obligation nonetheless

persisted throughout this period, under plaintiff's analysis, because the youngest child has not, as it turns out, yet completed law school. Moreover, qualifying training undertaken by any of the children after the youngest child's graduation from law school, even if undertaken well after the graduation, would presumably show that defendant's monthly payment obligation persisted yet longer. That, plaintiff contends, is the plain meaning of the agreement.

The district court implicitly rejected this understanding of the agreement, and we do so as well. We must, of course, resolve the question "by ascertaining and giving effect to the intention of the parties as expressed in the contractual language." **Anderson v. Anderson**, 251 Ga. 508, 307 S.E.2d 483, 484 (1983). Just as clear is our duty "to give a reasonable, lawful and effective meaning to all manifesta-

tions of intention by the parties." **Central Georgia Electric Membership Corp. v. Georgia Power Co.**, 217 Ga. 171, 121 S.E.2d 644, 646 (1961); see also **Gray v. Cousins Mortgage & Equity Investments**, 145 Ga. App. 889, 245 S.E.2d 58, 60 (1978) ("a reasonable construction is preferred to one which is unreasonable"). Item Four clearly provides for a termination of the payment obligation; it terminates once "each of the children has completed any college or graduate training which he or she wishes to undertake." Assuming that the residency and night courses were not qualifying training, all of the children had in May 1982 completed their training and not yet undertaken new qualifying training. Was defendant to continue making monthly payments after May 1982 because one of the children might have had an unexpressed wish to undertake qualifying training at some future time? We have

no contention here that any child made an express wish in May 1982. Was he to continue paying because a child might some day in fact undertake new qualifying training? To regard such wispy contingencies as sufficient to prevent termination is to deny the provision for termination all practical effect. Defendant was reasonably entitled to conclude that his Item Four obligation came to an end in May 1982 --again assuming the residency and night courses were not qualifying training. Of course, if that is a reasonable interpretation of the contract language, as we have concluded it is, then the agreement's meaning and effect become unclear in light of the youngest child's later enrollment in law school, undisputedly qualifying training. The district court resolved the unclarity reasonably by ruling that the contract provides for reinstatment of defendant's obligation if a child resumes

qualifying training. This ruling has not been challenged, and we turn instead to plaintiff's contention that the district court erred in concluding that the residency and the night courses did not qualify as Item Four training so as to reinstate defendant's payment obligation.

When considering the meaning of the phrase "college or graduate training" in Item Four, the district court had reference to the term "formal education" in Item Six, which provides that defendant shall provide certain insurance protection for the children "until they have completed their formal education." Concluding that the two terms were "essentially the same," the district court went on to use the term "formal education" in deciding whether the residency was qualifying training. We assay now to reconstruct the district court's thinking possibly underlying this mode of interpretation. The phrase

"college or graduate training" is, as plaintiff contends, a plain and ordinary term in the abstract. When applying it to the present circumstances, however, doubt arises. Does it subsume a medical residency, which although clearly part of a physician's training, has substantial elements of an employment relationship.[2] To resolve the doubt, we return to the intent of the parties as expressed in the agreement. Item Six, as noted, requires defendant to maintain insurance protection until the children have completed their formal education. The obligations in the two Items share the same evident purpose: to facilitate financially the children's education. There is no reason to suppose that the parties intended each obligation

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[2] See generally The Essentials of Accredited Residencies in Graduate Medical Education, reprinted in Accreditation Council for Graduate Medical Education., Am. Medical Ass'n, 1986-1987 Directory of Residency Training Programs sec. II (1986).

to terminate upon the happening of a different contingency. Thus, it is plausible to conclude that the parties intended the same meaning for the two terms at issue. This mode of interpretation accords fully with the customary rules of interpretation. It examines the language of the parties' agreement and draws reasonable inferences from that language; consequently, it is necessarily limited to "the intentions of the parties as expressed in the contractual language." **Anderson**, 307 S.E.2d at 484. Further, it abides by the frequent admonition to consider "the whole contract" when seeking "to ascertain the intention of the parties." **Hull v. Lewis**, 180 Ga. 721, 180 S.E. 599, 601 (1935).[3]

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[3] We thus reject plaintiff's contention that this mode of interpretation violates the rule that "no construction is required or even permissible when the language employed by the parties in their contract is plain, unambiguous, and capable of only one reasonable interpretation." Wolverine Ins. Co. v. Jack Jordan, Inc., 213 Ga. 299,

99 S.E.2d 95, 97-98 (1957). As noted, the meaning of the term "college or graduate training" is not free from doubt as applied to this case. Moreover, no construction is attempted here.

> A rule of construction . . . is one which in case of ambiguity gives a special meaning to language for reasons other than the normal meaning of the words or the actual or apparent intention of the parties. . . .
>
> [I]t may be said that the word "construction" is properly used wherever the import of the writing is made to depend upon an artificial meaning imposed by the law.

4 S. Williston, A Treatise on the Law of Contracts § 602, at 324 (W.H.E. Jaeger 3d ed. 1961) (footnote omitted). The **Wolverine** court may fairly be said to be using the term construction in the described sense. In the present case, as the text elaborates, only the expressed intention of the parties has been sought. As plaintiff herself acknowledges, "'The cardinal rule of construction is to ascertain the intention of the parties.' . . . '"Every other rule is subservient to this one."'" Paul v. Paul, 235 Ga. 382, 219 S.E.2d 736, 738 (1975) (quoting, respectively, Ga. Code § 13-2-3 (1982) (as recodified); Brooke v. Phillips Petroleum Co., 113 Ga. App. 742, 149 S.E.2d 511, 513 (1966)).

Further, we reject plaintiff's argument that this analysis supplants a specific term with a general term, thereby turning on its head the common-place rule that "a limited or specific provision will prevail over one that is more inclusive." Griffin v. Barrett, 155 Ga. App. 509, 271 S.E.2d 647, 648 (1980). Although the term "formal education" may under some circumstances be broader than the term "college or graduate training," it is, if anything, the narrower term under the circumstances of this case. In any event,

The district court noted that the oldest child, once he had an internship behind him, was not required under Georgia law to complete a residency before sitting for the medical licensing examination. The court used his eligibility to sit for the examination as a boundary marking the end of formal education (and thus college or graduate training) and the beginning of a subsequent working life. We note further that a residency, with its salary or stipend, among other things, in fact has substantial elements in common with a work or employment relationship,[4] and we affirm

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this rule of interpretation, requiring, as it generally does, a showing of "conflicting or repugnant provisions" or "apparent inconsistency" between clauses, 3 A.L. Corbin, Corbin on Contracts § 547, at 172, 176 (1960), finds no application in the present case.

[4] See supra note 2. The district court may have had this in mind when it noted that the State of Georgia pays for residency programs.

There was testimony that physicians generally receive money during their residencies. There was, however, plaintiff contends, no evidence con-

the district court's ruling that the residency was not qualifying training under Item Four.

Since the oldest child's internship ended in May 1982 and the subsequent residency did not reinstate defendant's payment obligation, we must examine whether any other circumstance, namely the youngest child's night courses while working full-time, did reinstate the obligation. Although night courses in a graduate program might be considered formal education, there is strong indication that the Item Four funds are to support the children as full-time students, not as full-time employees. The agreement provides that the monies are "to be used for the children's educational, clothing, allowance, and

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cerning the oldest child's own particular circumstances in this respect. We are nevertheless forced to reach a conclusion based upon the general characteristics of residencies since the record does not illuminate any of the particular circumstances of the oldest child's residency.

other personal expenses." The basis for our ruling is more limited, however. By May 1982, the youngest child was not enrolled in any night course, her last enrollment having been in the 1982 winter quarter. She again enrolled in night courses only in the fall of 1982, but dropped out in October 1982, never again resuming this course of study. The district court concluded that her enrollment had been "spasmodic, irregular and not part of her 'formal education.'" We understand this as a conclusion that the youngest child was not undertaking any training qualifying under Item Four. Certainly, this was true by May 1982, and we affirm on that basis.

2.

Under her second assignment of error, plaintiff argues that the district court erred in its treatment of the term "gross income" in Item Three of the agreement.

Under Item Three, the amount of each party's gross income is employed in a formula for determining the alimony to be paid to the plaintiff. Item Three establishes this pertinent definition: "As used in this item the term 'gross income' shall be construed to include all compensation paid by the parties' primary employers." In June 1983, defendant's primary employer made him a one-time payment of $500.00, and the dispute here centers on this payment. The defendant testified that the payment reflected reimbursement for out-of-pocket expenses, although there was evidence tending to conflict with this explanation. The district court found that the payment was reimbursement, not compensation, and thus concluded that it was not gross income under Item Three.

Whether the payment was reimbursement or compensation was a disputed basic fact under the **Backar** standard of review de-

scribed above. The clearly erroneous standard of review in Federal Rule of Civil Procedure 52(a), of course, applies to the district court's finding on this basic fact. We uphold the finding under that standard and, further, affirm the district court's conclusion that the disputed payment was not within Item Three's definition of gross income.

3.

Third, plaintiff asserts that the district court erred in referring to a Mississippi criminal contempt case, **Langford v. Langford**, 253 Miss. 483, 176 So. 2d 266 (1965), when deciding whether to hold defendant in contempt of court. It is evident why the district court had reference to the **Langford** case. As that case demonstrates, Mississippi courts have apparently permitted private parties under certain circumstances to petition a court to hold another in criminal contempt. **Langford**,

176 So. 2d at 266. The plaintiff did not, in her contempt motions, specify whether criminal or civil contempt was intended. For this reason presumably, the district court made sure to consider both criminal contempt and civil contempt, as demonstrated by its citation to **Walters v. Walters**, 383 So. 2d 827 (Miss. 1980), a civil contempt case.

Citing cases discussing the standard for determining civil contempt when a party has failed to make alimony or child support payments under a divorce decree, plaintiff further suggests that the district court was without discretion in the matter, even though the **Walters** court clearly thought otherwise. **Walters**, 383 So. 2d at 828-29. The comparative ease with which Mississippi courts will find contempt under the cases plaintiff cites is justified by the special status of a decree or judgment for alimony or child support:

> A judgment or decree for alimony carries with it a special power and right of enforcement not given in judgments at law. There is a difference between a judgment for money or property and that of a decree for alimony; and the decree for alimony, because of such difference in the character of the obligations, may be enforced by more efficient and effective means than those given to the enforcement of judgments at law.

Fanchier v. Gammill, 148 Miss. 723, 114 So. 813, 814 (1927). In the case of alimony, there is an "extraordinary right of enforcement," including "contempt proceedings," "due to the character of the judgment." Id. The district court, of course, found no delinquency in alimony payments and found citation for contempt inappropriate in a case involving, not failure to provide child support, but failure "to provide payments to the education fund for the benefit of . . . emancipated children." We find no abuse of discretion in this conclusion.

The district court, applying Mississippi law, determined that an award of attorney's fees to plaintiff was not warranted. In her final assignment of error, plaintiff does not contest the district court's conclusion under Mississippi law, but rather argues that it was required to apply section 13-6-11 of the Georgia Code instead. In support of this argument, plaintiff refers us to a footnote of the opinion in **Hazen Research, Inc.** There Judge Goldberg explained that 28 U.S.C. § 1738, by mandating that state judicial acts "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . from which they are taken," had not created a basis for federal question jurisdiction under 28 U.S.C. § 1331. Thus, even though section 1738 "provides

the standard to be used in evaluating any judicial acts introduced," some other jurisdictional basis, such as diversity of citizenship, is needed. **Hazen Research, Inc.**, 497 F.2d at 153 n.1. He went on to remark that the situation is "anomalous" in a diversity case because "Congress has . . . federalized all relevant legal questions--a diversity case in which there are no issues of forum state law." Id. Plaintiff would apparently have us believe that 28 U.S.C. § 1738 refers to and incorporates the Georgia statute she would have the district court apply. We reject the argument.

Section 13-6-11 of the Georgia Code provides:

> The expenses of litigation generally shall not be allowed as part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

Ga. Code § 13-6-11 (1986 Cum. Supp.) There is no contention that plaintiff prayed for and was awarded section 13-6-11 relief in the Georgia action resulting in the decree she is now enforcing in the present action. Instead, she seeks, as she must,[5] recovery of litigation expenses incurred in the present enforcement action.

It is well settled that the "law of the jurisdiction granting a foreign judgment full faith and credit determines the methods by which the judgment may be enforced." **Dorey v. Dorey**, 609 F.2d 1128, 1132 (5th Cir. 1980). Further, a federal court sitting in diversity follows the enforcement practices of the state in which

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[5] "[R]ecovery of . . . expenses of litigation pursuant to OCGA § 13-6-11 may not be had where such expenses do not arise out of the present action . . . ." Alston v. Stubbs, 170 Ga. App. 417, 317 S.E.2d 272, 274 (1984).

it sits. See id. at 1133.[6] Thus, application of the Georgia statute was appropriate only if a Mississippi court would have applied the statute. Under the general rule, "the methods by which a judgment of another state is enforced" are determined by the "local law of the forum," Restatement (Second) of Conflict of Laws § 99 (1971), that is, the forum's law "exclusive of its rules of Conflict of Laws," id. § 4. We assume that Mississippi courts would follow the general rule and apply their own law respecting attorney's fees when enforcing another state's judgment or decree. See **Fanchier**, 114 So. at 814 (adopting the "rule which allows the enforcement of a foreign decree for alimony in the same manner that it could have

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[6] Whether the state law it so applies is federally incorporated or state law applicable ex proprio vigore, see supra at pp. 16-17 the discussion of **Hazen Research, Inc.**, is not a question we need address in this case.

been enforced, if originally attained here"); cf. **Ehrenzweig v. Ehrenzweig,** 86 Misc. 2d 656, 383 N.Y.S.2d 487, 498 (Sup. Ct. 1976) (applying New York local law on counsel fees in action to enforce Connecticut divorce judgment), aff'd, 61 A.D.2d 1003, 402 N.Y.S.2d 638 (1978). Accordingly, we affirm the district court's refusal to apply Georgia Code § 13-6-11 in the present action.

III. Conclusion

For the reasons stated, we affirm the judgment of the district court.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

MILDRED BAILEY BELL,
Plaintiff,

v. CIVIL ACTION NO.
EC 85-193-D-D

JOHN THOMAS BELL, JR.,
Defendant.

MEMORANDUM OPINION

[Filed Feb. 24, 1986]

This is an action brought by the plaintiff, Mildred Bailey Bell, to enforce a Georgia divorce decree as the judgment of this court. The plaintiff, an attorney and law professor at Mercer Law School in Macon, Georgia, is suing her former husband, Dr. John Thomas Bell, Jr., a Ph.D., who is on the faculty of the School of Veterinary Medicine at Mississippi State University in Starkville, Mississippi. The amount in controversy involves a sum

in excess of $10,000. The court's jurisdiction is pursuant to 28 U.S.C. § 1332.[1]

Subsequent to a bench trial, the court proceeds to make its findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

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[1] Generally, jurisdiction is granted to federal district courts in all cases where there is diversity of citizenship and where the requisite jurisdictional amount exists. 28 U.S.C. § 1332. Cases involving domestic relations, however, have long been recognized as an exception to this rule. Simms v. Simms, 175 U.S. 162 (1899); Barber v. Barber, 62 U.S. 21 (How.) 582 (1859); Jagiella v. Jagiella, 647 F.2d 561, 564 (5th Cir.), reh'g denied, 654 F.2d 723 (5th Cir. 1981). Where a case involves matter that is primarily a marital dispute, a federal court will decline jurisdiction, even though the diversity and jurisdictional amount requirements have been met. Brown v. Hammonds, 747 F.2d 320, 322 (5th Cir. 1984).

Though federal courts should generally abstain from hearing domestic relations cases, when the suit involves "little more than a private contract to pay money between persons long since divorced, whose children are well into adulthood," the domestic relations exception does not apply. In these cases, federal district courts may properly assume jurisdiction over the action. Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978); see also Davis v. Davis, 558 F. Supp. 485, 486 (N.D. Miss. 1983).

I. FINDINGS OF FACT

The plaintiff and defendant were married on September 18, 1948, in Atlanta, Georgia. Three children were born of that marriage: Tom, a physician, now 32; Elizabeth, an attorney, now 30; and Ansley, a law student at Mercer University, now 26. The plaintiff commenced a divorce action against the defendant in 1974 and a divorce decree was entered severing the bonds of matrimony between the parties on November 6, 1974, by the Superior Court of Clarke County, Georgia. A written separation agreement duly executed by the parties that had previously been entered into was incorporated into and made a part of the Clarke County court's decree and judgment. The separation agreement was prepared and written by the plaintiff and was subsequently executed by the defendant. The matter is now before this court primarily for interpretation, construction, and en-

forcement of the terms of the separation agreement which this court deems to be contractual in nature.

Item Three of the separation agreement provided in pertinent part:

> So long as Mildred's earned income is less than Tom's, monthly payments shall be made by Tom to Mildred according to the following formula: (Tom's gross pre-tax income) minus (Mildred's gross pre-tax income) divided by (2) plus (15%). As used in this item, the term 'gross income' shall be construed to include all compensation paid by the parties' primary employers.

Item Four of the separation agreement provided:

> Each of the parties to this agreement shall deposit, to a bank account . . . the sum of $500.00 per month to be used for the children's educational, clothing, allowance, and other personal expenses. . . . All of the provisions contained in this item shall be fully operative until each of the children has completed any college or graduate training which he or she wishes to undertake . . .

Item Six of the agreement provided that Tom would continue to provide hospitaliza-

tion and major medical insurance protection for each of the three children until each had completed his or her formal education.

The controversy before this court is addressed to the aforementioned provisions of the separation agreement. The proof in the case established that the defendant began making monthly payments pursuant to the separation agreement and divorce decree in February 1977. He continued those payments through May 1981. At that time, he notified the plaintiff that the check he tendered in June of 1981 would be the last payment he would make and that he concluded that his obligations pursuant to the terms of the divorce decree were then concluded. In May 1981, Tom obtained his degree from medical school, the older daughter Elizabeth graduated in May 1981 from the Mercer Law School, and the younger daughter Ansley obtained her undergraduate degree from Mercer University at the same time.

Although all of the children received degrees in 1981, two of them, the son Tom and the youngest daughter Ansley later pursued additional education and training. Tom, after obtaining his degree from medical school, entered a one-year internship program at Presbyterian St. Luke Hospital in Denver, Colorado. He completed the internship in the spring of 1982. He then entered a three-year residency program in opthamology [sic] at the Medical College of Georgia, the opthamology [sic] residency was completed in June 1985. Tom, who was licensed to practice medicine in 1984, is now actively engaged in the practice of opthamology.

After graduating from Mercer with a bachelor's degree in 1981, Ansley began working full-time for Burroughs Corporation in November 1981. She initially enrolled in night graduate courses at Mercer University while working for Burroughs

Corporation. She continued such night courses during the fall of 1981 and the winter of 1982 quarters while pursuing her employment on a full-time basis. She subsequently was transferred by her employer to Augusta, Georgia, and commenced taking night graduate courses during the fall of 1982 at Augusta College. She later was transferred a second time by her employer, this time to Atlanta, and in October 1982 she dropped her graduate courses. In August 1984, Ansley entered the Mercer University School of Law and has continued as a full-time law student since that date. She is currently a second year law student at Mercer University.

In April 1982, the defendant resumed making payments into the educational fund in the amount of $500 per month and continued to make those payments until April 1983 when he made a final payment of $423. The proof was that during the period 1982-

83 Dr. Bell paid in a total of $7,060.82 into the fund. These 1982-83 payments were made during the period that the son Tom was pursuing either his internship or residency relative to his medical training. The daughter Ansley was enrolled in the various night graduate courses while employed on a full-time basis by the Burroughs Corporation during this period. The defendant Dr. Bell testified that the payments during 1982-83 were tendered after he learned that his daughter Ansley was in graduate school. The parties stipulated that by his letter of February 26, 1983, the defendant acknowledged an arrearage of $2,562.82 as amounts due to the educational fund for the period ending in June of 1981. The ccurt is of the opinion that the balance of $4,500 is to be applied to his current liabilities under the separation agreement.

On June 16, 1983, the defendant re-

ceived $500 from his employer in addition to his regular salary. It is the opinion of the court that this $500 was paid to the defendant to reimburse him for out-of-pocket expenses he had incurred in the course of his employment. It is the opinion of the court that this one-time reimbursement was not compensation paid by Dr. Bell's employer and would not fall within the purview of Item Three of the separation agreement.

The proof as to Item Six concerning the payment of hospitalization and medical insurance premiums by the defendant was to the effect that the usual and customary practice of the parties during the period 1977 through June 1981 provided for the plaintiff, Mrs. Bell, to purchase the insurance and for the defendant, Dr. Bell, to reimburse her for the amount of subject premiums. The only proof testified to in the trial of this matter concerning hos-

pitalization and medical insurance was that $946 was due and owing for the period subsequent to August 1984 when Ansley commenced law school at Mercer University. It is the opinion of the court that Dr. Bell owes the plaintiff $946 for hospitalization and major medical insurance premiums for the period that the younger daughter Ansley was enrolled as a full-time student at the Mercer University School of Law. The plaintiff avers that the defendant is in contempt of the Georgia divorce decree in that he has failed to tender payments pursuant to Items Three, Four and Six of the separation agreement during the period that the son Tom was an intern and medical resident and while Ansley was enrolled in graduate school and subsequently in law school. In essence, it is the contention of the plaintiff that the defendant should have continued payments from the date the same were commenced in 1977 up to and in-

cluding the present date and continuing in the future until such time as Ansley completes law school. It is the defendant's contention that each of his children is an emancipated adult and that his obligation to contribute to the education of the three children terminated with his payment in June 1981.

II. CONCLUSIONS OF LAW

Pursuant to 28 U.S.C. § 1738, federal district courts must give full faith and credit to final judgments rendered by state courts. Government Personnel Mutual Life Insurance Co. v. Kaye, 584 F.2d 738, 739 (5th Cir. 1978); Hazen Research, Inc. v. Omega Materials, Inc., 497 F.2d 151, 153 (5th Cir. 1974). Thus, a final divorce decree rendered in a state court will have "the same credit, validity and effect" in a federal district court as it has in the state where it was rendered. Kaye, 584 F.2d at 739; Holm v. Shilensky, 388 F.2d

54, 56 (2d Cir. 1978) (quoting Hampton v. McConnell, 16 U.S. (3 Wheat) 234, 235 (1818)). The court finds that the Bell divorce decree entered by the Superior Court of Clarke County, Georgia, was a final decree pursuant to former Georgia Code § 19-6-19 (superseded in 1977), and that it is entitled to full faith and credit in this court.

A father's statutory duty of support in Georgia does not include supporting his children beyond the age of majority. Anderson v. Anderson, 251 Ga. 508, 508-09, 307 S.E.2d 483 (1983); Calvin v. Calvin, 238 Ga. 421, 233 S.E.2d 151 (1977). A father may, however, voluntarily agree to provide support for his children beyond that required by statute. When he does so agree, he is bound by the terms of this agreement. Anderson, 251 Ga. at 509; McClain v. McClain, 235 Ga. 659, 221 S.E.2d 561 (1975). In the case sub judice, the

plaintiff and defendant are bound by the terms of their settlement agreement.

At issue is the phrase in Item Four: "until each of the children has completed any college or graduate training which he or she wishes to undertake" and the phrase in Item Three [sic]: "until they have completed their formal education." The parties to the separation agreement are bound by the words that appear in the agreement. St. Regis Paper Co. v. Aultman, 280 F. Supp. 500, 507 (M.D. Ga. 1967), aff'd, 390 F.2d 878 (5th Cir. 1968). The words in such an agreement generally bear their common and usual meaning. In construing the language of the separation agreement, the court must look to the whole agreement in arriving at the construction of any part thereof. Lindwall v. Lindwall, 242 Ga. 13,

247 S.E.2d 752 (1978). Item Four of the agreement refers to "college and graduate training" while Item Six refers to "formal education." It is the opinion of the court that these two terms are essentially the same and that "college and graduate training" are components of one's "formal education."

A contract that is entered as a settlement of child support obligations is subject to construction by the court just as other contracts are. The court looks to the intent of the parties at the time they entered the agreement. Fetzer v. Fetzer, 240 Ga. 862, 864 (1978); McKie v. McKie, 213 Ga. 582, 100 S.E.2d 580 (1957). When ex-spouses dispute the interpretation of a settlement agreement that has been incorporated into a divorce decree, "their dispute must be resolved by ascertaining

and giving effect to the intention of the parties as expressed in the contractual language." Anderson, 251 Ga. at 509; Goodrum v. Fuller, 237 Ga. 833, 229 S.E.2d 639 (1976). The court is cognizant of the fact that the plaintiff, an attorney, drafted the agreement and that the same should be construed more strongly against her. In this regard, it is significant that Item Four of the agreement did not limit or restrict the three children to a specific age or a designated number of years in which to pursue their college education or training. The defendant, Dr. Bell, is a well educated and obviously intelligent person. The court accordingly must conclude that it was not his intent to limit his children in their educational pursuits.

Based on the language in the agreement, the court finds that the defendant's obligation under Item Four and Item Six of the

agreement initially terminated in 1981 when all three children obtained degrees in their respective fields. This obligation, however, was soon reinstated when the defendant's son, Tom, began his one-year medical internship. The court is of the opinion that Tom's one year of internship was part of his "formal education," but that his three years of residency were not. In Georgia, a medical school graduate must complete a one-year internship or residency training program before he will be allowed to take a medical licensing examination. Ga. Code § 43-34-27(a)(2). The graduate is not required to complete both an internship and a residency. A resident, unlike an intern, is a <u>physician</u> who is receiving additional medical training and education through a teaching hospital. The cost of training these physicians is funded by the state. Ga. Code § 31-7-95(a)-(b). Consequently, the court

is of the opinion that Tom's formal education ended in 1982, when he completed the requirements for sitting for the Georgia examination for a license to practice medicine.

The court views Ansley's enrollment in and withdrawal from part-time graduate classes while she had a full-time job as being spasmodic, irregular and not part of her "formal education." Nonetheless, it is the opinion of the court that Ansley did resume her formal education when she entered law school in August 1984, as a full-time student. At this time, the defendant's obligations under Items Four and Six were reinstated.

As to the one-time $500 payment that defendant received from his employer, the court finds that this payment was to reimburse the defendant for out-of-pocket expenses he had incurred on behalf of his employer and was not part of his compensa-

tion from his employer to be computed in the salary-equalization formula under Item Three of the parties' agreement.

In divorce cases, as in other cases, "the law of the jurisdiction granting a foreign judgment full faith and credit determines the methods by which the judgment may be enforced." Dorey v. Dorey, 609 F.2d 1128, 1132 (5th Cir. 1980) (citing Lynde v. Lynde, 181 U.S. 183, 187 (1901)). The court must look to Mississippi law to determine whether contempt is an appropriate enforcement tool in the case sub judice. Criminal contempt in Mississippi is imposed as a punishment. To be held in contempt, the defendant must have willfully, maliciously and contumaciously refused to comply with a prior decree of a court. Langford v. Langford, 176 So. 2d 266, 267 (Miss. 1965). Even then, it is within the court's discretion whether to find the defendant in contempt. See Walters v. Wal-

ters, 383 So. 2d 827, 828-29 (Miss. 1980). In the court's opinion the conduct of the defendant, Dr. Bell, in failing to provide payments to the education fund for the benefit of his emancipated children did not evidence wilful, malicious or contumacious behavior. Therefore, the court holds that Dr. Bell is not in contempt of court at this juncture.

The court has broad discretion in determining whether attorney fees are appropriate. Walters, 383 So. 2d 827, 829 (Miss. 1980); Hartley v. Hartley, 317 So. 2d 394 (Miss. 1975); Klumb v. Klumb, 194 So. 2d 221 (Miss. 1967). It is the court's opinion that attorney fees are not appropriate under the facts of this case.

Based on the above findings of fact and conclusions of law, the court holds that the defendant must pay the plaintiff $946.00 under Item Six of the Agreement.

Under Item Four, the defendant is lia-

ble to the education fund in the following amounts:

1) Ansley's law school education:

1984	$2,500
1985	6,000
1986	1,000
	$9,500

2) Tom's one-year internship:

1981-1982	$6,000

3) The defendant is to be credited with the payments he tendered in the years 1982-83 in the amount of $4,500.

The court further holds that the amount payable into the college fund is a liquidated amount, i.e., $500 per month. Consequently, interest pursuant to Georgia Code § 7-4-12 will be assessed at the rate of 12% per annum. This interest is to be amortized at the aforementioned rate on the principal amount of $500 per month for the months of March, April and May of 1982 and from August 1, 1984, to the date hereof.

A separate judgment shall be entered this date.

This 20th day of February, 1986.

Glen H. Davidson
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4196
Summary Calendar

D.C. Docket No. CA-EC-85-193-D

MILDRED BAILEY BELL,

Plaintiff-Appellant,

versus

JOHN THOMAS BELL, JR.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

Before REAVLEY, JOHNSON, and DAVIS, Circuit Judges.

JUDGMENT
[Sept. 18, 1986; Mandate issued Oct. 27]

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this

cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

September 18, 1986

ISSUED AS MANDATE: Oct. 27, 1986

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4196

MILDRED BAILEY BELL,

Plaintiff-Appellant

versus

JOHN THOMAS BELL, JR.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi

ON SUGGESTION FOR REHEARING EN BANC

(Opinion, September 18, 1986)

Before REAVLEY, JOHNSON and DAVIS, Circuit Judges.

PER CURIAM: [Filed Oct. 16, 1986]

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the

panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 37), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Sam Johnson

United States Circuit Judge

Oct. 14, 1986

ORDERED and **ADJUDGED** this 20th day of February, 1986.

Glen H. Davidson
United States District
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

MILDRED BAILEY BELL

Plaintiff

v

Civil Action No.
EC 85-193-GD-D

JOHN THOMAS BELL, JR.

Defendant

ORDER CLARIFYING JUDGMENT

[Filed April 15, 1986]

Presently before the court is the plaintiff's motion to clarify the judgment entered herein on February 24, 1986. After considering the proposed schedules of principal amount due and interest, the court is of the opinion that the plaintiff's computations are correct and are in accordance with Georgia Code § 7-14-17. The court notes, however, that the plaintiff has included the amount of $63.24 as being due for a Blue Cross payment as of February 1, 1986. No evidence of this amount was sub-

mitted to the court, and therefore, this amount cannot be included in the court's judgment. In accordance with the court's judgment entered herein on February 24, 1986, the defendant owes the plaintiff $14,975.31

This 14th day of April, 1986.

Glen H. Davidson
United States District Judge